No. 20436

In the

United States Court of Appeals

For the Ninth Circuit

D. J. MILLER,

Appellant,

-vs-

COUNTY OF LOS ANGELES, a Political Subdivision of the State of California,

Appellee.

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE

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in Decision, this case, at 341 F2d 964 (February 27, 1965), page 965:

> "* * * appellant claims to be the owner of 200 acres of specifically described real property located in the County of Los Angeles, State of California, title to and possession of which is in appellee as purchaser of the property at a surreptitious tax sale of property conducted by the tax collector of appellee. It is charged that the tax sale proceedings culminating with the acquisition of title by appellee were unlawful in that notices of such proceedings were not given to appellant although his name and mailing address were known to the officials of appellee who conducted such proceedings, and appeared in the pertinent tax books and records of appellee, and as a result of which unlawful tax proceedings appellant has been deprived of his property without due process of law. Appellant seeks to have it declared that title to said property is held by appellee in trust for him; that title to the property be vested in him on payment of all delinquent taxes and penalties accruing on said real property

to his first demand upon the appellee for the reconveyance of title to appellant, * * *."

PROCEEDINGS IN THE DISTRICT COURT AFTER REMAND

After this case was remanded to the District Court the defendant moved for summary judgment with points and authorities, exhibits and affidavit, filed June 7, 1965. (Tr. 61) Plaintiff moved for judgment on the pleadings, filed June 22, 1965. (Tr. 82) Plaintiff subsequently served points and authorities with exhibits and affidavit in opposition to the defendant's motion for summary judgment, filed June 30, 1965. (Tr. 98) The Court granted defendant's motion for summary judgment, filed July 16, 1965. (Tr. 126) Plaintiff motioned for rehearing with points and authorities, filed July 21, 1965 (Tr. 128), which were supplemented and included affidavit and exhibits, filed August 3, 1965. (Tr. 141)

The Court below denied plaintiff's Motion for Rehearing, filed August 16, 1965. (Tr. 149) Notice of Appeal was filed September 3, 1965 (Tr. 150) Plaintiff below filed with the Court

of Appeals pursuant to Rule 13 of this Court "Points on Which Appellant Intends to Rely" on October 12, 1965 (Tr. 151)

SPECIFICATION OF ERROR

The Court below erred in granting summary judgment because there was a triable issue of fact for the following reasons:

(1) That the appellant herein was deprived of his property without due process of law in violation of the "Due Process Clause" of the Fourteenth Amendment.

(2) Appellant's contentions of a constructive trust in appellee and inadvertant constructive fraud, together or taken singly, overrule the "Statute of Limitations" relied on by appellee.

(3) There is such clear equity in appellant's favor that the doctrine of equitable estoppel should control.

(4) In opposition to the appellee's contention that the appellant's claim is barred by the Statute of Limitations, appellant relies upon his allegations that a fiduciary relationship existed

between the parties to these proceedings and appellee violated said fiduciary responsibilities by misrepresentation to appellant as to appellant's rights in premises by way of its information to appellant pertaining to redemption and sale of the property, and failure to mail notice.

(5) One who moves for Summary Judgment, such as the appellee here, has the burden of clearly demonstrating no genuine issue of fact. Any doubt as to the existence of such issue should be resolved against applicant.

(6) On an application for motion for summary judgment, pleadings are liberally construed in favor of the party opposing the motion and said party is given the benefit of all favorable inferences which might reasonably be drawn from the evidentiary matter of record before the Court. Here appellee owed a fiduciary relationship to appellant which appellant's affidavits and record below amply allege and show to have been breached and violated by appellee.

SUMMARY OF ARGUMENT

Appellant is entitled to have the property vested in him. Since his mailing address was known to appellee's

officials, its sale was consequently clearly unlawful because no notice was sent. Further still, subsequent misinformation from appellee's agents and officers totally frustrated appellant's intent and efforts to redeem and to determine when thereafter timely action should be filed. Hence, appellant should prevail on the theory either of constructive trust or the other doctrines urged, particularly equitable estoppel. The real property is worth many times the amount of the debt due appellee. Appellant was deprived of it without due process of law, in violation of his constitutional rights. No intervening improvements to the property, innocent third party rights or other bona fide collateral equities are involved or concerned. No statutes of limitation relied on by appellee are applicable to the particular facts of this action, and if any such did so pertain, appellee is estopped to assert them.

ARGUMENT

I

THE MODERN VIEW IS TO LOOK AT THE STATUTE OF LIMITATIONS EQUITABLY

An excellent illustration of the many federal appellate cases pertaining to equity and the statute of

limitations is Ellgass v. Brotherhood of Railroad Trainmen Insurance Department, Inc., et al., 342 F2d 1, wherein this court said, on page 4:

> "The equitable doctrine which we are applying is illustrated in the case of Tyra v. Board of Police and Fire Pension Commissioners, 32 Cal. 2d 666, 197 P.2d 710 * * *."

Appellant's principal argument is that Ellgass and Tyra are wholly analogous to and controlling of this case. In the one there was insurance, in the other there was a pension wrongly denied --there was a misleading of the claimant by defendant in each, to claimant's detriment, and the statute of limitations was thereafter attempted to be used as a defense in each, after defendant's own conduct had caused and brought about the claimant's delay in filing action. Here the property (200 acres) represents a substantial part of appellant's life savings and was an investment to serve the same purpose as insurance or a pension.1/ If there is any real distinction between the cases, equity more than balances it in appellant's

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1/ Appellant is not and does not expect to become eligible for any pensions or insurance providing his future support or maintenance.

favor since in Ellgass and Tyra there had to be a possibly unanticipated and unamortised disbursement from the appellee's respective insurance and pension accounts while here at bar appellee will receive the money actually due it but will lose nothing. And there was in this case even more -- appellant's reliance upon an even stronger, fiduciary relationship between appellant and appellee public office and officials.

In Burnett v. New York Central Railroad Co., 85 S.Ct. 1050 (1965) the Supreme Court substantially followed this Court's rulings in Ellgass. On page 1054 it held:

> "Statutes of limitations are primarily designed to assure fairness to defendants."

Defendant will have all the fairness which it may claim, legal or equitable, if plaintiff prevails. It will receive its due payment. The Supreme Court further said on page 1055:

> "This policy of repose, designed to protect defendants, is frequently out-weighed, however, where the interests of justice require vindication of the plaintiff's rights."

In the "Federal Reporter" advance reports of November 1, 1965, under "limitation of actions" the following is found:

> "C.A.Pa. 1965. The modern view is to hold that the period of limitations is tolled because of plaintiff's innocence, even though defendant had no knowledge that a claim would be made against him. Northern Metal Co. v. U. S., 350 F.2d 833.

In the above case on page 37 the Court said:

> "Many situations have arisen where courts of justice have been compelled to recognize the right to sue even though by the clock alone the time has run. So it early came to be recognized that the statute of limitations would not begin to run against an action for fraud until its discovery by plaintiff." Bailey v. Glover, 88 U.S. (21 Wall.) 342, 22 L.Ed. 636 (1874).

Then later, in Northern Metal Co., the Court cited the Supreme Court case, Burnett, supra, hence, there is a line of cases in 1965 with the "modern view" of equitable justice beginning with the

Ninth Circuit case, Ellgass, then followed by the Supreme Court, lastly by the Court of Appeals of the Third Circuit.

II

THERE WAS MISINFORMATION FURNISHED APPELLANT WHICH PREVENTED HIM FROM ACTING TO REDEEM HIS PROPERTY OR FILE SUIT SOONER.

The time lag in filing suit was much longer in Ellgass, although appellee complains that plaintiff's action should have been filed sooner. Exhibit "C" (Tr. 114) to Plaintiff's Opposition to Defendant's Motion for Summary Judgment is a letter from appellee's officers describing the property by what is actually a legal description consisting of only 10 acres, although this same letter specifically states it to be 40 acrea. In real fact appellant's letter of inquiry requesting information concerned and described a total 200 acres, the correct amount of his property involved.2/

2/ Appellant never alleged that appellee deliberately sent this erroneous letter to confuse appellant, only that it shows an inadvertant but continuing

Appellee has failed to allege or intimate how plaintiff could have filed any effective or even intelligible action if he could not find out from appellee the pertinent information regarding his property. In other words, plaintiff did not and could not otherwise know or learn what the status of his property in question actually was.

Nowhere in the record of this case has appellee clarified the foregoing frustrating misinformation which compounded the previous oral misinformation as shown by appellant's affidavit (Tr. 094 and 095). Hence, there was both oral and written misinformation which not only in effect prevented appellant's redemption of the property but which also prevented appellant's earlier information and decision that filing of suit would be necessary. Appellant has shown that he did not act and perform as he would otherwise have done had he known the facts, which were not disclosed to him because of the failure of appellee's officers to perform in the light of their duty and

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2/ [Cont'd] neglect of its duty and indifference to rights of appellant. In any event, it is documented evidence which substantiates verbal misinformation and indifference.

trust; it is submitted that those facts deserve the application of the doctrine of equitable estoppel.

Other exhibits to the same document are: "A", "A-1", "B" and "B-1". (Tr. 110, 111, 112, 113) These exhibits show that there was posted of record in appellee's official records a correct address previously used by appellee's officers in correspondence with appellant regarding this same land and and address where if appellee had sent notice it would have been received and acted upon.

In Ellgass at page 4, the Court said:

> "The defendant's letter contained statements and assumptions which were erroneous, fundamentally and dangerously erroneous."3/

Further on the same page, this Court stated:

> "The plaintiff says that, in spite of this lapse of time, the period of limitation provided in his contract

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3/ This is precisely the same as the portent of appellee's letter, Exhibit "C" (Tr. 114).

> has not run against his claim because, in the circumstances, the defendant is estopped from relying on that provision. We agree with the plaintiff." (Emphasis added.)

And again, on the same page, the following language which has a clear relevancy to this case is found:

> "These statements were inexcusably erroneous on the part of the union, and we see no equity in permitting the union to profit by its own wrong." (Emphasis added.)

III

CURRENT HEADLINES IN THE NEWS MEDIA DISCLOSE WEAKNESS WITHIN COUNTY TAXING SYSTEMS WHICH ADVERSELY AFFECT THE PUBLIC INTEREST.

Recent disclosures of scandalous operations within the property tax system of various counties make a further distinction between this case and the Howard Case (so frequently cited by appellee.) As reported in the "Los Angeles Herald" of September 21, 1965:

> "Assembly speaker Jesse M. Unruh today[4] 'pitied' the property taxpayer as the last 'VESTIGE OF FEUDALISM' * * *."

"'Under present law there is virtually no protection for the harassed taxpayer,' * * * 'and no court will take his case. An appeal to county supervisors is usually fruitless, as the issue of equity gets confused * * * with the need for revenues.'"

"Unruh claimed the property tax system lacks justice and fair play and is alien to our form of government."

Moreover, previously there was an article in the "Los Angeles Times" of September 13, 1965 which is as follows:

"ASSEMBLY COMMITTEE TO LOOK INTO TAX SCANDAL

"Lawmaker Says Inquiry Will Show Trail 'Of Collusion, Extortion, Bribery, Fraud'

"A state assemblyman declared Sunday that his committee will look into the state's tax assessment scandal and will develop testimony 'showing a fantastic trail of collusion, extortion, bribery and fraud.'

4/ [From page 13] In speaking to the California Savings and Loan League.

> "Assemblyman John T. Knox (D-Richmond), chairman of the Assembly Municipal and County Government committee, told the Times he has examined part of the court-impounded files * * * and on this basis the scandal 'appears to be the greatest example of governmental corruption since * * *."

The foregoing material while concerning principally alleged malfeasance rather than misfeasance has a relationship to the substance of the case at bar in that it shows elements erupting from the administrative magma which at the very least point to a condition of affairs existing in or as a result of the ramifications of property taxation which crystallize the considerations and application of equity so well illustrated and exemplified by the principle and holdings of the said Ellgass case. Surely the above quoted legislators have (by their very words) indicated that they never intended any so-called statute of limitations to be applied as an inadvertant tool to confiscate a citizen's property after inadvertant negligence and neglect of duty to that citizen.

IV

FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE IMPROPER.

Appellee's findings of fact and conclusions of law adopted by the Court were not proper on summary judgment.

On summary judgment it is improper for findings of fact and conclusions of law to be filed. Bohn Aluminum and Brass Corp. v. Storm King Corp., C.A. Ohio (1962) 303 F2d 425; Hindes v. U.S., C.A.Tex. 1964, 326 F.2d 150, certiorari denied 84 S.Ct. 1168, 377 U.S. 908, 12 L.Ed. 2d 178.

Making of specific findings and separate conclusions is ill advised where no genuine material factual issue is presented to court, since this would carry an unwarranted implication that fact question had been presented. A R Inc. v. Electro-Voice, Inc., C.A.Ind. 1962, 311 F.2d 508.

V

APPELLANT'S FAILURE TO FILE PROPERTY STATEMENT WAS IRRELEVANT AND IMMATERIAL

The appellant is placing in the appendix another letter from appellee's neighboring counties with respect to the reqirements or necessity of filing a property statement. This point has been covered in the proceedings below in Plaintiff's Supplemental Memorandum in Support of Motion for New Trial. (Tr. 138, 140, also at Tr. 100 in Opposition to Summary Judgment). No personal property, improvements or other matters calling for any property statement are alleged, involved or concerned in this action.

As shown by Exhibit "A" to Affidavit and Supplemental Memorandum on July 29, 1965, the assessor's office of Ventura County advised:

> ". . . it is only necessary that personal property be declared by the taxpayer. Real property is automatically placed on our assessment roll." (Tr. 140)

Appellant has sworn in his Affidavit that the assessor's office in San Bernardino told him,

> "The property statement is not required." (Tr. 138)

VI

SUMMARY JUDGMENT FOR APPELLEE WAS IMPROPER ON THE FACE OF THE RECORD.

Plaintiff cited below, numerous authorities regarding impropriety of summary judgment for appellee, defendant below. (Tr. 131, 132, 133)

The cases are legion that "in resolving defendant's motion for summary judgment facts must be assumed that are most favorable to plaintiff." McKnight v. N.M. Paterson & Sons, Limited, D. C. Ohio (1960) 181 F.Supp. 434, affirmed 286 F.2d 250, certiorari denied 82 S.Ct. 189, 368 U.S. 913, 7 L.Ed. 2d 130.

The affidavit filed with appellee's Motion for Summary Judgment stated legal conclusions which must be disregarded as held by this Court, and was not supported by any probative documents. (Tr. 100, line 14):

> ". . . affidavit stating legal conclusions and papers . . . not attached to an affidavit must be disregarded." Washington v. Maricopa County (CCA 9), 143 F.(2d) 871.

VII

APPELLANT EXTENSIVELY CITED AUTHORITIES IN THE COURT BELOW ON DUE PROCESS, CONSTRUCTIVE TRUST, CONSTRUCTIVE FRAUD, EQUITY, ESTOPPEL AND STATUTE OF LIMITATIONS.

These are in the transcript of Record as follows:

(a) DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

U.S. v. Blaylock, 159 F. Supp. 874, Tr. 088, line 4; Schroeder v. City of New York, 83 S.Ct. 279, Tr. 091, line 13; Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 314, 20 S.Ct. 410, Tr. 091, line 24; Walker v. City of Hutchinson, 77 S.Ct., pg 202, Tr. 134, line 28; Western Union Telegraph Co. v. Industrial Commission of Minnesota, D.C. Minn. 1938, 24 F.Supp. 370, Tr. 135, line 30.

(b) CONSTRUCTIVE TRUST.

49 Cal.Jur.2d at page 228, Tr. 086, line 14; Doing v. Riley, 176 F. 2d 449, Tr. 087, line 4; Judge Cardoza, Tr. 088, line 31; Texas Co. v. Miller, 165 F.2d 111 C.C.A. Tex. 1948, Tr. 090, line 7.

(c) CONSTRUCTIVE FRAUD

Neet v. Holmes (1945), 154 P.2d 854, 25 Cal.2d 447 Tr. 090, line 18; Section 1573 of the Civil Code of the State of California, Tr. 090, line 20; Epstein v. U.S., 174 F.2d at page 766, Tr. 090, line 28.

(d) EQUITY

U.S. v. Certain Parcels of Land, 131 F.Supp. 65 at p. 71 (D.C.Cal.), Tr. 084, line 9, 089, line 6; Deauville Corp. v. Garden Suburbs Golf & Country Club, 164 F.2d 430, C.C.A. Fla. 1948, Tr. 089, line 30.

(e) FIFTH AND EIGHTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Gideon v. Wainwright, 372, U.S. 335, 83 S.Ct. 792, Tr. 143, line 28; Robinson v. California, 370 U.S. 660, 8 L.Ed. 2d 758, 82 S.Ct. 1417, Tr. 144, line 12.

(f) ESTOPPEL AND STATUTE OF LIMITATIONS

18 Cal.Jur.2d page 408, Tr. 087, line 9; Alma Inv. Co. v. Krausse, 117 Cal.App.2d 740 P. 744, 256 P.2d 1017 P. 1020, Tr. 087, line 22; People v. Gustafsoon, 53 Cal.App.2d 230, 127 P.2d

627, Tr. 088, line 26; Tyra v. Board of Police & Fire Pension Comm., 32 Cal.2d 666, 197 P.2d 710, Tr. 144, line 30, 145; Myers v. Hurley Motor Co., 1927, 273 U. S. 18, 24, 47 S.Ct. 277, 71 L.Ed. 516, Tr. 089, line 21.

CONCLUSION

Appellant submits on the basis of the record it would be a miscarriage of justice to refuse to him the right to retain his real property upon the payment of the taxes justly due appellee, particularly when no third party rights or equities have intervened or can be affected.

Respectfully submitted,

D. J. MILLER
Propria persona

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Attorney

APPENDIX

Mr. D. J. Miller
Box 728
Boulder City, Nevada 89005

Dear Mr. Miller:

In reply to your inquiry of July 21, 1965, generally speaking, if any personal property is involved, such as household furnishings, inventory and equipment, which must be declared, a Property Statement is required.

On the other hand, if only a building or land is involved, no Property Statement is usually made.

Very truly yours,

/s/ H. W. HOLMQUIST
County Assessor

HWH:LC

C O P Y